Supreme Court, U.S.
FILED
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No. 91-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., individually

Petitioner,

-against-

V.C.,

Respondent.

REPLY BRIEF SUBMITTED BY J.M., INDIVIDUALLY

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STATEMENT OF THE CASE

Subsequent to J.M. filing the Petition for Writ of Certiorari in the United States Supreme Court and V.C.'s response, V.C. filed a motion in the Appellate Division of the Superior Court of New Jersey seeking Summary Affirmance of the appeal on J.M.'s individual case. Despite V.C.'s arguments to the United States Supreme Court that the New Jersey Supreme Court's order of March 24, 1992 in J.M.'s individual case is not final[1] she argues to the Appellate Division that that Court is required to summarily affirm the Dismissal of J.M.'s individual claim because the March 24, 1992 Order of the New Jersey Supreme Court disposed of the case on the merits. In a brief submitted to the Appellate Division in support of a motion for "required" summary affirmance, V.C. argued that:

> Plaintiff's appeal asks this Court to contravene the decision of the New Jersey Supreme Court in this case.[2]

ARGUMENT

POINT I

UNDER THE FACTS OF THIS CASE, THE MARCH 24, 1992 ORDER OF THE NEW JERSEY SUPREME COURT IS FINAL WITHIN THE MEANING OF 28 USCA §1257(a).

Respondent V.C. contends that the March 24, 1992 Order of

[1] See, Res. Br. at 2 to 6.

[2] Paragraph one of Point II of V.C.'s brief is reproduced and found as Exhibit 2 in the Appendix to this Brief, at 7a.

the New Jersey Supreme Court is not "final" within the meaning of 28 USCA §1257(a) because, technically, proceedings are pending in the Appellate Division of the Superior Court of New Jersey (Resp. Br. p. 2-6). Respondent addresses this argument to J.M. in his individual capacity only, conceding that the Order of the New Jersey Supreme Court is final as to the child.

While making this argument before this Court, V.C. simultaneously advances an inconsistent argument before the Appellate Division in New Jersey. There V.C. argues that the Order of March 24, 1992 of the New Jersey Supreme Court precludes the Appellate Division from exercising an independent review of the trial court's dismissal of J.M.'s complaint brought in his individual capacity. In her brief filed on August 4, 1992 in the Appellate Division, V.C. argues that a substantive review of J.M.'s individual appeal would "contravene the decision of the New Jersey Supreme Court in this case," and the appeal is a "flagrant" request to "violate" the ruling of the New Jersey Supreme Court of March 24, 1992 (see Resp. Br., App. Div. at p. 11, reproduced in Appendix attached at 7a).

The procedural quirk which, on the face of it, requires J.M. to move through the New Jersey courts as a prerequisite to filing a

Petition for Writ of Certiorari under 28 USCA §1257(a) is the type of futile exercise which the United States Supreme Court has ruled is not required before that Court can review an Order on a Writ of Certiorari. *Mills v. State of Alabama*, 384 U.S. 214, 86 S.Ct. 1434 (1966); (where proceedings in lower state courts are "preordained"); see *Pope v. Atlantic Coastline R.Co.*, 345 U.S. 379, 73 S.Ct. 749 (1953); *North Dakota St. Bd. of Pharm. v. Snyder's Drug Store, Inc.*, 414 U.S. 156, 94 S.Ct. 407 (1973); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782 (1977).

Although J.M. was compelled to file a Notice of Appeal in the Appellate Division to insure that he would at least obtain one opportunity to have a petition reviewed, the New Jersey Supreme Court clearly considers itself powerless to review the merits of the issues presented in this case because they are federal constitutional questions that only the United States Supreme Court can resolve. The New Jersey Supreme Court stated:

> ... the Court having concluded that under current law, plaintiff's proffer of proofs would not realistically assist or inform the Court in its determination of legal issues properly before it ... .[3]

In *Mills, supra*, the United States Supreme Court, in holding that

[3] Appendix Volume I at 106.

an order of the Alabama Supreme Court was "final" for purposes of §1257(a), despite a remand of the matter to a lower court, explained:

> Thus, if the case goes back to the trial court, the trial, so far as this record shows, will be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of *Mills'* constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a round-about process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in a judicial systems already troubled by delays ... . *Mills*, 384 U.S. at 217, 86 S.Ct. at 1436.

That is precisely the situation in the present case. The New Jersey Supreme Court has already stated that facts are irrelevant to the legal inquiry and has resolved the legal issues in favor of V.C. V.C. suggests that J.M. must have the Appellate Division "summarily affirm" the lower courts decision (not being permitted a true review of the merits) and then have the Supreme Court do the same before the matter can be reviewed by the United States Supreme Court under §1257(a). The line of cases cited, such as *Mills*, speak to this very exception and treat the Order of March 24, 1992 as final. The procedure suggested by V.C. is "mechanical" (*Abood, supra*), an economic waste and delay of justice (*North*

Dakota, supra), and the later judgment of the New Jersey courts is "preordained" (*Mills, supra*). V.C.'s argument is particularly offensive to the legal concepts involved because of the fact that the child's case is concededly before the United States Supreme Court under 28 USCA §1257(a). For the purposes of judicial thoroughness, elimination of judicial waste in the interests of justice, the Court must be free to take the entire case if it so chooses.

POINT II

THE ORDER OF THE NEW JERSEY SUPREME COURT WHICH PERMITTED THE TAKING OF THE CHILD'S LIFE AND FAILED TO ENFORCE THE CONSTITUTIONAL RIGHTS OF THE CHILD AND J.M., INDIVIDUALLY, CONSTITUTES STATE ACTION.

V.C. argues that, because she is a private citizen, the Order of the New Jersey Supreme Court did not constitute state action (Resp. Br. at 8-9).[4]

It is axiomatic that for conduct to be violative of the constitution there must be some form of state action. *Shelly v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948); *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454 (1988). Where conduct of a private citizen is involved, a court order, in some instances, may itself constitute a

[4] V.C. raises this contention for the first time in the United States Supreme Court, having failed to raise it in the State Court before J.M. filed the petitions. Nonetheless, J.M. responds to this argument.

direct act of the state. e.g. *Shelly, supra*. State involvement in the private conduct also constitutes state action. e.g. *North Georgia Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601, 95 S.Ct. 719 (1975). In *Tarkanian* the majority framed the general inquiry concerning state action thusly:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the state was sufficiently involved to treat that decisive conduct as state action. 488 U.S. at 192, 109 S.Ct. at 462.

The court listed three general categories of state involvement in private conduct which constituted "state action": [1] where the state creates the legal framework governing the conduct; [2] where the state delegates its authority to the private sector; and [3] where the state knowingly accepts the benefits derived from unconstitutional behavior. *Tarkanian*, 488 U.S. at 192, 109 S.Ct. at 462.

Here the acts which harmed the plaintiff constitute state action on two separate levels: first, the order of the New Jersey Supreme Court itself was a direct act of the State which caused the harm, and second, the act of the abortion itself, performed by doctors, nurses and submitted to by the defendant was accomplished only with an impermissible level of involvement of the state

and was sufficient to constitute state action.

A.

Under certain conditions the issuance of a court order itself constitutes a direct act of the state, and is not merely an impermissible involvement of the state in what is otherwise private conduct. e.g. *Shelly v. Kraemer*, 334 U.S. 1, 58 S.Ct. 836 (1948) (an injunction issuing from a court is an affirmative act of the judicial branch of government); *New York Times v. Sullivan*, 376 U.S. 354, 84 S.Ct. 710 (1964) (an order enforcing a state created cause of action which impairs a constitutional right). As early as 1880 the United States Supreme Court, in *Virginia V. Rives*, 100 U.S. 313 (1880) noted "denials of equal rights in the action of judicial tribunals of the state are left to the revisory powers of this Court." 100 U.S. at 322; see also *ex parte Virginia*, 100 U.S. 339, 347 (1880); *Civil Rights Case*, 109 U.S. 3 (1883).

The United States Supreme Court observed in *Sullivan, supra*:

> Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms ... It matters not that that law has been applied in a civil action and that it is common law only ... The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised. *Id.* at 265.

Not every dispute between two private citizens results in state action simply because a state court has issued an order. However, as in *Sullivan*, the state court's application of a rule of law which imposes restrictions upon an individual's constitutional rights constitutes state action.

Under normal circumstances, the state may be under no obligation to act to prevent private conduct. There are, however, instances where it is the unique function of government to act. In some instances, the state's affirmative duty to act must be performed through its courts. As in *Sullivan*, one function of State courts is to enforce Federal Constitution Rights, and therefore, any state cause of action the Court seeks to enforce must reflect the Constitutional Rights of the litigants. It seems rather elementary that when a state attempts to enforce constitutional rights through its courts, as the New Jersey Courts did here (ruling V.C. had rights, but the child and J.M. did not) that the rulings constitute "state action" subject to the review of the U.S. Supreme Court. The state creates the rules by which disputes over the future of children are decided. So, too, it is the unique function of government to affirmatively provide protection to the life and safety of its citizens, especially children. No private organization

provides such services, the state specifically reserving the power to itself. When a citizen, therefore, seeks a court order to protect life, there is no where else for him to go, and the state has an affirmative obligation to intervene. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964). It is the affirmative duty of the State to protect children. 43 C.J.S. Infants, Sec. 5 at 67 (1978); see *D.Y.F.S. v. A.W.*, 103 N.J. 591, 512 A.2d 593 (1986); *Johnson v. State*, 18 N.J. 422, 430 (1955), Cert. Den. 355 U.S. 942.

We note four facts present in this case which support the conclusion that the order of the New Jersey Supreme Court constituted direct state action.

First, the trial court entered an injunction. The issuance of an injunction clearly constitutes state action. *Shelly v. Kraemer, supra.* Once a state does take action, it must do so without violating the constitutional rights of the litigants. When the New Jersey Supreme Court issued its order, in vacating the injunction of the lower court it clearly implicated the state in the conduct of V.C. Its order brought the painful death of the child under the sanction of the law. The Supreme Court, before reviewing the Court order enjoining the abortion, was therefore required to

consider the rights of the child and father, and its order was the equivalent to those in *Shelly* and *Sullivan*.

Second, the very life of the child was at stake. Unlike other rights, no redress of grievance could compensate for the impending loss. The Right to Live is unique and the state as the protector of life and public safety had a unique and affirmative duty to protect life when requested. *Raleigh-Fitkin, supra*, 42 N.J. at 423. In *Raleigh-Fitkin*, the New Jersey Supreme Court specifically found this obligation, stating: "We are satisfied that the unborn child is entitled to the law's protection ..." 42 N.J. at 423, 201 A.2d 537. This duty is especially stringent when a court is being asked to remove an injunction - a state act which gave official sanction to the private conduct. By removing the injunction, the state surely placed its imprimatur on the act of taking the life of this child. C.f., *Blum v. Yartesky*, 457 U.S. 991, 102 S.Ct. 2777, 2785 (1982).

Third, the act of the private citizen had not yet taken place and could only take place after the state acted. This distinguishes those cases where grievance is redressed after a private citizen has already acted and the state had no real involvement.

Fourth, this case does not involve a private entity which sets general policy in a private matter. This case involves a specific,

real and present danger to the plaintiff only. Petitioning the court is the only way J.M. could peacefully protect his child. Surely, V.C. does not suggest that J.M. must use force on V.C. and be arrested (in order to have "state action") before he can raise the rights of his child and those of his own. The only effective means to preserve the life of the child, the child's rights, and those of J.M. was to petition the court.

If V.C.'s argument is accepted then the constitution would not require New Jersey Courts to give her assistance in instances where J.M. or anyone else, had planned to kill her. Even when a killer waited outside the courtroom, with a loaded rifle, the court would not be required to enjoin his act because the impending, announced and planned murder would not constitute "state action" and her constitutional right to live and live in safety was "not implicated." She would be sent from the courtroom to the fate awaiting her outside.

Finally, the Court, in acting to determine the common law rights of the two parents and the child, where the parents disagreed on the future of the child, exercised and was required to exercise its *parens patriae* jurisdiction. In doing so it was required to apply the equal protection of the law to all parties. *Jersey Shore Medical*

Center - Fitkin Hospital, et al. v. Estate of Baum, 84 N.J. 137, 143-145 (1980).

The New Jersey Supreme Court, in *Jersey Shore* has stated:

> The Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law. The applicability of the equal protection clause depends not on whether a state has exercised its power in any particular form, but whether it has, in fact, exercised that power. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265,84 S.Ct. 710, 718, 11 L.Ed.2d. 686, 697 (1964). A state is obligated to provide equal protection of its laws not only in the acts of its legislature, but also in the decisions of its courts. Stated otherwise 'it has been recognized that the actions of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings, in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.' *Shelly v. Kraemer*, 334 U.S. 117, 68 S.Ct. 836, 844, 92 L.Ed. 1161, 1182-1183 (1948) (footnote omitted) (further citations omitted). Accordingly, the discrimination against husbands which results from application of the New Jersey Common Law Doctrine of Necessaries may be challenged under the Equal Protection Clause of the Fourteenth Amendment." *Jersey Shore v. Estate of Baum*, 84 N.J. at 144, 145.

New Jersey, therefore, was obligated to provide equal application of the child's Fourteenth Amendment Rights (and those of J.M. individually) as well as the State's own constitutional right to life and right to defend life. N.J. Const. Art. I, Sec. 1.[5]

[5] The New Jersey Supreme Court has found that the right to life is inalienable. *Gleitzman v. Cosgrove*, 49 N.J. 22, 30, 227 A.2d 689 (1967). Art. I, Sec. I specifically establishes a Right to Defend Life and a Right to Life itself. New

B.

Even if the order of the New Jersey Supreme Court was not a direct act of the state (which it was), it constituted impermissible state involvement, for all of the reasons set forth under section A above, in the private conduct of V.C., her doctor, and medical assistants because the state created the legal framework which governed her conduct. See *Tarkanian, 488 U.S. at 192, 109 S.Ct. at 462*. New Jersey applied its law as well as what it perceived to be the Federal Constitutional law.

In 1978 New Jersey Repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor. In doing so it removed all prohibition against a mother taking the life of her child. New Jersey has given a cause of action to parents where doctors fail to advise them that their unborn child may be born diseased, so that the mother can have an abortion. *Berman v. Allen*, 404 A.2d 8 (1979). New Jersey has created a constitutional right to funding of "therapeutic abortions." *Right to Choose v. Byrne*, 450 A.2d 925 (1982). New Jersey, in licensing its physicians, specifically gave them license to

Jersey has found, although it is currently subject to *Roe*, that an unborn child has a right to live. *Hummel v. Reiss*, 129 N.J. 118, at __, 608 A.2d 1341, at __, July 21, 1992.

terminate the life of a child before birth. New Jersey licenses and regulates doctors and hospitals through the Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-42(b) (Termination of Pregnancy)[6]

The regulations of the doctors specifically and affirmatively authorize abortions anytime prior to birth. Even after 20 weeks gestation the only limitations placed upon the abortion is that the doctor must request from the State Board permission to perform a "D and E" procedure (always fatal to the child)[7] in a licensed ambulatory care facility. N.J.A.C. 13:35-4.2(g). The physician must, in order to obtain such permission, show he or she has the proper training.

The state has created rules by which it literally licenses individuals to take the life of a child anytime prior to actual birth. This specific licensing and regulation, together with repeal of all prohibitions against abortion, constitutes the creation of rules of a

[6] The state administrative code governing the Board of Medical Examiners as it pertains to termination of pregnancy is reproduced as Exhibit 3 of the Appendix to this brief.

[7] See, *Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483, 103 S.Ct. 2517, 2521.

legal framework for the conduct. Without it, the abortion of J.M.'s child would not have taken place.

The licensing procedure to authorize specific individuals to take the life of the child itself creates this framework. This licensing procedure can be distinguished from those found in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *Jackson v. Met. Ed. Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974) in two separate ways. First, the license in *Moose Lodge* and *Jackson* were collateral to the actual conduct complained of. Here, the state specifically and affirmatively licenses doctors and hospitals to perform the precise act resulting in the harm. Second, in *Moose Lodge* and *Jackson*, though the state had the power to license, the private actors performed functions that were outside the functions of the state. Here, it is the specific function of the state to protect the lives of its citizens. It reserves that role to itself. The state, therefore, in giving express authorization to doctors and hospitals to take the lives of children is involved in activity which is within the unique function of the state. To expressly authorize the taking of life when the state has a duty to protect that life implicates the state in the conduct of the private actors.

POINT III

BECAUSE THE CHILD IS IN FACT A PERSON PRIOR TO BIRTH, THE FOURTEENTH AMENDMENT MUST BE CONSTRUED TO PROVIDE THE CHILD PROTECTION UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

V.C. purports to see no relevance to the scientific facts that: (1) the life of a person begins at conception; and (2) soon after conception, and long before birth, a child feels pain during an abortion. V.C. relies upon the *Roe* Court finding that there is no specific or implied reference in the text of the Constitution to the status of the child, before birth, as a member of a class of persons who enjoyed constitutional rights [Resp. Brf. at 21-26]. However, if the Court conducts a reexamination of this question, it must conclude that a child enjoys rights under the Fourteenth Amendment even prior to birth.

A.

Despite statements by V.C. to the contrary, this Court has expressly examined the legal question of whether a person enjoys rights under the Fourteenth Amendment, prior to birth, only once, in *Roe v. Wade*, 410 U.S. at 156-162, 93 S.Ct. at 728-731 (Section IX)(See Pet. p. 22-29). This attempt was impaired because that Court was unable to reach a conclusion on the

factual components of the inquiry. The Court asserted that, at that particular point in "man's knowledge" (1973), the Court was unable to determine when life begins.

Roe therefore denies what is now known to be a basic truth: the life of every individual human person begins at conception. In addition, a child experiences pain very early in development and abortion causes a painful, brutal death of a child. *Roe* and its progeny is based upon a false assumption concerning the most important and central fact of the legal analysis. As a result, *Roe* and all subsequent cases have never analyzed the constitutional question with the understanding that the child is, in fact, a human being who experiences pain prior to birth. These two facts require a totally different legal analysis than the one provided in *Roe*.

B.

Once these facts are established, the inquiry becomes quite different; it no longer is appropriate to examine the use of the word "person" in the text of a clause for qualifications to hold public office (see Pet. p. 22-29). The question becomes what is perhaps the most profound in all of Constitutional jurisprudence: Is the Supreme Court of the United States free to exclude from protection of the Fourteenth Amendment any specific class of per-

sons legally within the borders of the nation? Is it an inherent contradiction for the Court to hold that the Equal Protection Clause guarantees equal application of the law while excluding its benefits to any class of persons? (see Pet. p. 22-29) Is the right of any individual to live dependent upon the subjective judgments of others concerning the intrinsic value of that life, or do all individuals enjoy that right independent of the subjective beliefs of others? It includes other inquiries which strike at the core of the function of the Court and government itself. What are the proper criteria for the Court to use in answering the ultimate issue? Did *Roe* use the proper criteria? In the absence of a precise definition of "person" anywhere in the text of the Constitution, what principles should the Court employ?

The inquiry also requires an examination of the function of government. Does the fact that states reserve to themselves the police power to protect life and provide safety create a duty to provide protection before the harm is caused where the state has an opportunity to do so?[8]

[8] We speak here of general rules of application, and the state's obligation to refrain from creation of rules which authorize the taking of life. We distinguish this obligation of the state from instances where individuals would seek to create a civil cause of action following individual private acts. See, e.g. *DeShaney v.*

This inquiry includes the question concerning the consequences of the recognition of the child's rights. It would seem to clearly require the state to refrain from authorizing or assisting in the taking of the child's life. The State could not license doctors and hospitals and extend the authority to perform prohibited abortions. It may also mean that the States would be given considerable discretion in the manner they choose to protect the child's rights.[9]

C.

The joint opinion in *Casey v. Planned Parenthood of S.E. Pa.* expressed concern that when *Roe* is overruled, the Court must provide a valid explanation. That is a proper concern. But now the Court can and should take cognizance of the fact that the child is a helpless human being capable of experiencing pain, and the most dependent upon the great rights enumerated in our Constitution. The Court should review the rights of the child, find the truth and build an analysis on the facts which are real. When the Court recognizes the rights of the child because present science can provide the answers it now does, the American public will accept

Winnebago Cty. Dep. of Soc. Sec., ___ U.S. ___, 109 S.Ct. 998 (1989).

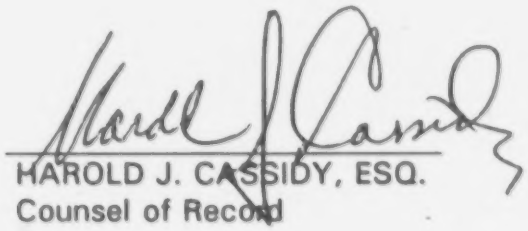
[9] Some states may determine not to create criminal penalties. Some may choose to do so. All must refrain from authorizing the prohibited conduct.

the Courts' decision no more baldly than it did *Brown v. Board of Ed.*, because it is based upon a truth that all can understand as just: this is a child who experiences pain.

CONCLUSION

The newly available scientific information which establishes that the life of every human being begins at conception, and the child is capable of experiencing pain in the early stages of pregnancy, require that the Court reexamine the question of whether the child has rights prior to birth. The fact that the child is, in fact, in existence prior to birth, implicates the individual rights of J.M.

The Court should grant Certiorari in this case.



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APPENDIX
EXHIBIT 1
CORRECTED ORDER TO SHOW CAUSE
WITH TEMPORARY RESTRAINTS
ENTERED: MARCH 9, 1992

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JM, individually as guardian ad litem of his unborn child Plaintiff, vs. VC; WMC; JOSEPH BLOW RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. CIVIL ACTION ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

THIS MATTER having been opened to the Court by Cassidy, Foss & San Filippo, Harold J. Cassidy, Esq., appearing, and Patrick

J. Mullaney, Esq., attorneys for the Plaintiff, and the Court having reviewed the Plaintiff's Verified Complaint, the Certifications, the sworn testimony presented, Plaintiff's Brief and the arguments of Plaintiff's counsel; and the Court having determined for good cause showing that: (1) it clearly appears from the specific facts shown by the sworn testimony and the Verified Complaint that the Plaintiff is the unwed natural father of an unborn child; that the Defendant, V C [1] is the unwed mother of that unborn child; that the Defendant has been pregnant for approximately eight weeks; that the Defendant V C intends to abort her pregnancy without the consent of the natural father on or about March 11, 1992; that the Plaintiff, the natural father opposes the abortion of the unborn child and wishes to raise and support the child; that the Plaintiff wishes to assert his rights as the natural parent of the child; that the Plaintiff, as the natural parent, wishes to assert the rights of the unborn child; and therefore, that immediate and irreparable harm will result to the Plaintiff; (2) Plaintiff has demonstrated a substantial likelihood of success on the merits; (3) Plaintiff has demonstrated that any harm to the Defendants

[1] The full names of the parties appeared in original. Because the Court so ordered, the names were later dedacted and the initials used in their places.

resulting from the imposition of the temporary restraints requested by Plaintiff is outweighed by the harm which would result to the Plaintiff if such restraints were not imposed; and (4) the imposition of the temporary restraints against the Defendants does not contravene the public interest;

IT IS on this 7th (sic)[2] day of March, 1992 at 3:35 P.M.

ORDERED that Plaintiff's application for a temporary restraining order shall be and hereby is granted as follows:

A. Defendant V C is hereby prohibited and enjoined from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Defendant WMC , Howell, New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will

[2] The order was actually signed at 3:35 p.m. March 9. The erroneous date of March 7 appears in original.

otherwise result, directly or indirectly, in the termination of the pregnancy of V C ;

C. Each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C ;

IT IS FURTHER ORDERED that on forty-eight (48) hours' notice to Plaintiff's counsel, Defendants may appear and move the dissolution or modification of this Order; and

IT IS FURTHER ORDERED that the restraints imposed by this Order shall expire on the 30th day of March 1992 at 4:00 P.M., unless extended by further order of this Court; and

IT IS FURTHER ORDERED that the defendants are enjoined from disclosing, directly or indirectly, the identity of the plaintiff, John Doe, and the true identity of Jane Roe, and Ordered to take all reasonably precautions to prevent an inadvertent disclosure of them; and

IT IS FURTHER ORDERED that V C is enjoined from leaving the State of New Jersey for the purpose of terminating the life of her unborn child; and

IT IS FURTHER ORDERED that the Defendants or their attorneys show cause before this Court at the Superior Court of New Jersey at the Monmouth County Court House in Freehold, New Jersey, on March 30, 1992, at 1:30 o'clock P.M., why an Order should not be entered:

A. Permanently prohibiting and enjoining Defendant V C from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Permanently prohibiting and enjoining Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C ;

C. Permanently prohibiting and enjoining each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C ; and

IT IS FURTHER ORDERED that this order shall not be disclosed or revealed to anyone other than defendants counsel where the names of the parties are visible or revealed; and

IT IS FURTHER ORDERED that Defendants file an Answer to the Plaintiff's Complaint, and submit any briefs and/or certifications or affidavits in opposition to the above relief, not later than March 26, 1992 at 4:00 P.M., and that Plaintiff submit any reply briefs and/or certifications or affidavits not later than March 27, 1992 at 4:00 P.M.

/s/ Patrick J. McGann, Jr.
J.S.C.

EXHIBIT 2
A PORTION OF PAGE 11 OF RESPONDENT V.C.'S BRIEF FILED IN APPELLATE DIVISION OF SUPERIOR COURT OF NEW JERSEY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE FILED AUGUST 7, 1992

II. PLAINTIFF'S APPEAL ASKS THIS COURT TO CONTRAVENE THE DECISION OF THE NEW JERSEY SUPREME COURT IN THIS CASE.

Plaintiff's appeal asks this Court directly to contravene the holding of the New Jersey Supreme Court in this case. When both sides appealed to the New Jersey Supreme Court, that Court not only reversed the TRO imposed on V.C., but over plaintiff's objections summarily dismissed the only remaining portion of plaintiff's complaint, bluntly ruling that plaintiff's factual allegations were irrelevant, and a trial unwarranted, because "plaintiff's proffer to proofs would not realistically assist or inform the court in its consideration of the legal issues properly before it." App. 116a. Thus, as plaintiff himself has correctly noted, the import of the New Jersey Supreme Court's order is that there shall "never" be a trial on the various issues plaintiff has raised in this case. *See* Plaintiff's Supplemental Brief to the New Jersey Supreme Court in Support of Motion for Reconsideration, at 4. Yet, plaintiff's appeal, in asking for a trial in the Chancery Division, asks this Court flagrantly to violate precisely this ruling.

EXHIBIT 3
REGULATION OF THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEW JERSEY 13:35-4.2 (TERMINATION OF PREGNANCIES)

13:35-4.2 Termination of Pregnancy

(a) This rule is intended to regulate the quality of medical care offered by licensed physicians for the protection of the public, and is not intended to affect rules of the Department of Health establishing institutional requirements. To the extent that rules of the two agencies may overlap, the Medical Board recognizes and relies upon the regulatory procedures of the Department of Health in establishing minimum acceptable standards for non-physician personnel, equipment and resources, the adequacy of the physical plant of the facility in which surgical procedures shall be performed, and the facility's interrelationship with an adequate network of health care-related resources such as ambulance service, etc.

(b) The termination of a pregnancy at any stage of gestation is a procedure which may be performed only by a physician licensed to practice medicine and surgery in the State of New Jersey.

(c) Provisions of this rule referring to stage of pregnancy shall be in terms of weeks from start of last menstrual period or "weeks LMP." For example, the stage of pregnancy at 12 weeks gestational size, as determined by a physician, is the equivalent of 14 weeks from the first day of the last menstrual period (LMP).

(d) After 14 weeks LMP, any termination procedure other than dilation and evacuation (D & E) shall be performed only in a licensed hospital.

(e) Fifteen weeks through 18 weeks LMP: After 14 weeks LMP and through 18 weeks LMP, a D & E procedure may be performed either in a licensed hospital or in a licensed ambulatory care facility (referred to herein as LACF) authorized to perform surgical procedures by the Department of Health. The physician may perform the procedure in an LACF which shall have a Medical Director who shall chair a Credentials Committee. The Committee

shall grant to operating physicians practice privileges relating to the complexity of the procedure and commensurate with an assessment of the training, experience and skills of each physician for the health, safety and welfare of the public. A list of the privileges of each physician shall contain the effective date of each privilege conferred, shall be reviewed at least biennially, and shall be preserved in the files of the LACF.

(f) Nineteen weeks through 20 weeks LMP: A physician planning to perform a D & E procedure after 18 weeks LMP and through 20 weeks LMP in an LACF shall first file with the Board a certification signed by the Medical Director that the physician meets the eligibility standards set forth in (f)1 through 7 below and shall comply with its requirements.

1. The physician is certified or eligible for certification by the American Board of Obstetrics-Gynecology or the American Osteopathic Board of Obstetrics-Gynecology, and the physician satisfactorily completes at least 15 hours of Continuing Medical Education each year in obstetrics-gynecology.

2. The physician has admitting and surgical privileges at a nearby licensed hospital which has an operating room, blood bank, and an intensive care unit. The hospital shall be accessible within 20 minutes driving time during the usual hours of operation of the clinic.

3. The procedure shall be done in a location which is designated by the Department of Health as a licensed ambulatory care facility (LACF) authorized to perform surgical procedures as in subsection (e) above. The LACF shall be licensed by the Department of Health as an ambulatory care facility authorized to perform surgical procedures. The facility shall be in current and good standing at all times when surgical procedures are performed there. The LACF shall have a written agreement with an ambulance service assuring immediate transportation of a patient at all times when a patient has been admitted for surgery and until the patient has been discharged from the recovery room.

4. The procedure shall be done in an LACF which shall have a Medical Director and a Credentials Committee which have duly

evaluated the training, experience and skill of the physician at continuous and successive levels of complexity of the D & E procedure in pregnancies advancing in stages from 18 weeks LMP through 19 weeks LMP through 20 weeks LMP, and the physician has been granted successive practice privileges consistent with management of the increased risk to the health and safety of the patient at that stage documented in the personnel file maintained for that physician. (Where the applicant physician is also the Medical Director, the physician shall submit a certificate from the Administrator or Chief of Department of a hospital or the Medical Director of an LACF where the applicant has been evaluated and credentialed in a comparable manner.) The physician new to the LACF shall have his or her operating technique evaluated initially and at least yearly by the Medical Director or his or her designee who shall possess appropriate experience with D & E procedures at least as advanced as those for which the applicant physician seeks approval. The applicant shall be evaluated during that number of procedures which shall be adequate to achieve a sufficient professional skill, and the evaluation procedure shall be documented in the personnel file maintained for that physician. The Medical Director shall agree to review the charts of all patients who suffer complications and in addition shall review charts at random, and shall calculate the complication rate of each physician.

5. The physician shall perform the procedure only on a patient who has been examined and found to be within the eligibility criteria established for advanced D & E procedures in the LACF setting.

6. The procedure shall be performed in an LACF providing adequate staff support and resources for the operative procedure as well as interim follow-up and post-operative care, and where a physician is available and readily accessible 24 hours/day to respond to any postoperative problem.

7. The physician shall cooperate with the Medical Director to maintain contemporaneous and cumulative statistical records demonstrating the utilization and safety record of each stage procedure and of each surgeon. Said records shall be available for inspection by the Board and copies shall be submitted to the Board

semi-annually. These records shall include the following information and data shall be maintained in records compiled monthly, but individual patients comprising the lists shall be identified only by date and by initials and/or case number:

i. Number of patients who received termination procedures;

ii. Number of patients who received laminaria or osmotic cervical dilators who failed to return for completion of the procedure;

iii. Number of patients who reported for postoperative visits;

iv. Number of patients who needed repeat procedures;

v. Number of patients who received transfusions;

vi. Number of patients suspected of perforation;

vii. Number of patients who developed pelvic inflammatory disease within two weeks;

viii. Number of patients who were admitted to a hospital within two weeks of the procedure.

ix. Number of patients who died within 30 days.

Subparagraphs ii. through ix. above shall be summarized by number and percentage of monthly total for post-18 week procedures. The Board shall inspect such reports monthly for the first five months and at such further monthly intervals as it deems necessary.

(g) After 20 weeks: A physician may request from the Board permission to perform D & E procedures in an LACF after 20 weeks LMP. Such request shall be accompanied by proof, to the satisfaction of the Board, of superior training and experience as well as proof of support staff and facilities adequate to accommodate the increased risk to the patient of such procedure.

(h) The physician shall make suitable arrangements to insure that all tissues removed shall be properly disposed of by submission to a qualified physician for pathologic analysis or by incineration or by delivery to a person/entity licensed to make biologic and/or tissue disposals in accordance with law including rules of the Department of Health applicable to an LACF.